STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT HAROLD RUSTIN,

Defendant-Appellant.

UNPUBLISHED
July 8, 1997

No. 189908
Genesee Circuit Court
LC No. 95-052313-FC

Before: MacKenzie, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree felony murder, MCL 750.316; MSA 28.548. Defendant was sentenced to life in prison without parole. We affirm.

Defendant first argues on appeal that the trial court erred in admitting certain photographs taken of Robinson, the victim, at the crime scene. Defendant also argues that the trial court abused its discretion in admitting testimony regarding testing performed on a condom found near the crime scene. We disagree. The decision to admit evidence is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *People v Davis*, 199 Mich App 502, 516-517; 503 NW2d 457 (1993); *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification for the ruling. *Watkins, supra*..

The admission of photographs as evidence is a matter within the discretion of the trial court. *People v Mooney*, 216 Mich App 367, 377; 549 NW2d 65 (1996). Where substantially necessary or instructive to show material facts or conditions, photographs are admissible. *Id.*, citing *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994). If photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. *Mooney, supra* at 378; *Hoffman, supra*..

We conclude that the trial court did not abuse its discretion in admitting the photographs taken at the crime scene. *Davis, supra; Watkins, supra.* An unprejudiced person, considering the facts on

which the trial court acted, would say that the ruling was justified. *Watkins, supra*. The photographs of her back, arms and hand were instructive to show the conditions surrounding Robinson's death, specifically, they showed the injuries she suffered in attempting to protect herself from her assailant and numerous cross-hatched abrasions on her body evidencing that she was pressed against and dragged over rough, uneven objects such as cement, asphalt, or gravel. *Mooney, supra*. The photographs at issue are not particularly gruesome or shocking primarily because they show only scraped and bruised skin and do not show Robinson's skull fracture or face. *Hoffman, supra* at 19. Given that the photographs were admissible for a proper purpose, i.e., to prove the method and circumstances surrounding Robinson's death, they were not rendered inadmissible merely because they portrayed the details of a gruesome or shocking crime, even assuming that they may have tended to arouse the passion or prejudice of the jurors. *Id.* at 18-19.

We further hold that the trial court did not abuse its discretion in admitting testimony regarding the test results of the condom discovered over one hundred feet from Robinson's body, which was found partially dressed, lying spread-eagled in a ditch. A wrapped, unused condom was also found in defendant's truck. The condom discovered near the scene contained semen, which was determined not to have originated from defendant. Testimony established that Robinson's DNA was not found on the condom, either. Based upon these circumstances, we believe that the evidence regarding the condom was irrelevant due to the testimony that it could not be linked to either defendant or Robinson. Although we do not condone the admission of irrelevant evidence, we do not believe that this evidence, which was briefly mentioned during the middle of a lengthy trial, prejudiced defendant or constituted error requiring reversal. *People v Rodriquez (On Remand)*, 216 Mich App 329,332; 549 NW2d 359 (1996).

Defendant next argues that the trial court erroneously instructed the jury as to felony murder because there was insufficient evidence of the underlying offense, attempted third-degree criminal sexual conduct. We disagree. We view jury instructions as a whole rather than extracting them piecemeal in order to find error. *People v Tims*, 449 Mich 83, 109-110; 534 NW2d 675 (1995). A defendant is not entitled to a new trial if the instructions fairly presented to the jury the issues to be tried and sufficiently protected the rights of the defendant. *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994); *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994).

The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548, of which third-degree criminal sexual conduct is one. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995); *People v Thew*, 201 Mich App 78, 85; 506 NW2d 547 (1993). A felony-murder conviction may be sustained where the victim dies during the attempt to perpetrate the underlying crime. MCL 750.316; MSA 28.548; *People v Hutner*, 209 Mich App 280, 284; 530 NW2d 174 (1995).

A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist: (a) that other person is at least 13 years of age and under 16 years of age; (b) force or coercion is used to accomplish the sexual penetration, or (c) the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520d(1); MSA 28.788(4)(1). Circumstantial evidence, and reasonable inferences arising from the evidence, may constitute satisfactory proof of the elements of the offense. *Hutner, supra*.

We conclude that viewing the jury instructions as a whole, *Tims, supra*, the instructions fairly presented to the jury the issues to be tried and sufficiently protected defendant's rights, *Holt, supra; Gaydosh, supra*, as sufficient evidence was presented to establish attempted third-degree criminal sexual conduct. The evidence showed that Robinson was intoxicated and that she was flirting with, laughing with, and hugging defendant in the parking lot at the Corunna Road Bar. Robinson was last seen with defendant in the parking lot. When Robinson's body was found, her blue jeans were wrapped around her feet and she was lying spread-eagled in a ditch. Her shoes were off and her shirt was torn. Robinson's blood and hair were found in the back of defendant's van. We conclude that sufficient circumstantial evidence was presented to show that defendant attempted to engage in sexual penetration with Robinson through the use of force or coercion when he knew or had reason to know that she was intoxicated and physically helpless. MCL 750.520d(1); MSA 28.788(4)(1).

Upon viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that sufficient evidence was presented to prove attempted third-degree criminal sexual conduct beyond a reasonable doubt. Thus, we hold that the trial court properly instructed the jury as to the charge of felony murder. A rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could find beyond a reasonable doubt that defendant acted with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, while attempting to commit third-degree criminal sexual conduct. *Turner, supra; Thew, supra*.

Defendant next argues that the trial court abused its discretion in allowing the prosecutor to reopen her case and permitting blood samples to be taken from a defense witness, Randal Davis, who testified that he may have gotten blood on the inside of defendant's van after he stepped on a nail and injured his foot. We disagree. Generally, the reopening of proofs for either the prosecution or defense rests within the sound discretion of the trial judge. *People v Collier*, 168 Mich App 687, 694-695; 425 NW2d 118 (1988). Relevant in ruling on a motion to reopen proofs is whether the moving party would receive any undue advantage and whether there is any showing of surprise or prejudice to the nonmoving party. *Id.* An abuse of discretion by the trial court is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification for the ruling. *Watkins, supra*.

We hold that the trial court did not abuse its discretion in permitting the prosecutor to reopen her proofs to allow blood samples from Davis to be taken and analyzed by an expert who was called as a rebuttal witness. An unprejudiced person, considering the facts on which the trial court

acted, would conclude that there was justification for the ruling. *Watkins, supra*. Defendant's theory of the case was that Davis' blood, which dripped on the crate when he injured his foot, was the blood the police found in defendant's van. The prosecutor provided DNA evidence to the jury in her case in chief, which indicated that the blood found on the crate and on paper inside the crate did not match defendant's DNA but did match Davis'. The evidence provided by defendant regarding Davis' blood did not discuss his DNA characteristics. Because defendant presented this evidence as a plausible explanation for the blood on the crate, it should not have surprised defendant that the prosecutor asked permission to perform similar DNA testing on Davis' blood to determine the results. *Collier, supra.*

Lastly, defendant argues that he was denied a fair and impartial trial as a result of prosecutorial misconduct. We disagree. We review this issue on a case by case analysis to determine whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Defendant alleges that the prosecutor improperly shifted the burden of proof to him by suggesting that defendant failed to disprove the proffered DNA evidence. We disagree. The Michigan Supreme Court has held that the prosecution does not improperly shift the burden of proof to the defendant by commenting that the evidence against the defendant is uncontroverted or undisputed. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

Furthermore, we conclude that the prosecutor was responding to statements made by defense counsel regarding the reliability of the DNA evidence when making the alleged improper remarks. This Court has held that no misconduct occurs where the prosecution's comments were made in response to arguments raised by defense counsel. *People v King*, 210 Mich App 425, 434; 534 NW2d 534 (1995). Because a prosecutor may properly respond to issues raised by defense counsel, *id.*, we hold that the prosecutor properly commented on the DNA evidence that was presented to the jury.

In addition, defendant argues that the prosecutor vouched for the credibility of the expert witnesses by indicating the that DNA evidence was sufficiently reliable. We disagree. A prosecutor may not vouch for the character or credibility of a witness or place the prestige of his office behind them. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). The record must be read as a whole, however, and the allegedly impermissible statements judged in the context in which they are made. *Id.*

Evaluating the prosecutor's remarks in context after reviewing the record as a whole, *id.*, we conclude that the prosecutor did not vouch for the credibility of the witnesses or the DNA results, but rather, commented on the evidence and argued reasonable inferences that could be drawn from the evidence. A prosecutor is forbidden from arguing facts not entered into evidence. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). Prosecutors are free, however, to argue the evidence and all reasonable inferences from the evidence as it relates to their theories of the case. *Id.*

Given that the DNA evidence, including the method of processing and testing the DNA, was extensively discussed at trial, and the experts were subject to cross-examination by defense counsel, we hold that the prosecutor properly commented on the evidence in her closing argument, and drew reasonable inferences from the results of the DNA testing. *Id.*

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Janet T. Neff
/s/ Jane E. Markey